EEO Complaints Filed by Contingent Employees

Or, "When are Government contractor employees, independent contractors, volunteers, and individuals participating in training, work-study or fellowship programs considered 'employees' under Title VII?"[1]

Before the Equal Employment Opportunity Commission (EEOC) or the agency can consider whether the agency has discriminated against a complainant in violation of Title VII, it must first determine whether or not the complainant is an employee or an applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. Section 2000e-16 (a) *et seq.* Title VII prohibits discrimination by federal agencies against "employees" and "applicants for employment." It does not expressly prohibit discrimination by federal agencies against independent contractors. "In order to determine whether an individual is an employee under Title VII, the court will consider all of the incidents of the relationship between the [Complainant] and the agency . . ." *Wenli Ma and Zheng v. Dept. of Health and Human Services*, EEOC Appeal Nos. 01962390 and 01962389 (June 1, 1998).

Current guidance for the Department of the Army concerning contingent employees is found in "EEO Joint Employer Guidance - Interim Guidance Oct 98" (EEO Joint Employer Guidance). It states, "This memorandum is intended to provide guidance in the processing of such complaints. This guidance applies to complaints brought by independent contractors, volunteers, employees of government contractors, individuals participating in training, work-study or fellowship programs and all other individuals working on Army installations or projects without being on the activity's payroll or meeting the definition of a civil service employee under 5 U.S.C. 2105(a) or a nonappropriated fund employee described at 2105(c)." This guidance dictates that, "In all formal complaints filed by individuals who are not Title 5 employees or applicants, Labor Counselors must provide a fact-based analysis and legal opinion on whether the complainant is covered under 42 U.S.C. 2000e-16 or the other discrimination laws. To expedite and aid this analysis, upon the assignment of an EEO Counselor, EEO Officers shall contact the appropriate agency management officials to obtain the information referenced on Attachment 1, Working Relationship Information; this information shall be forwarded to the Labor Counselor with the formal complaint for review."

Attachment 1 to the EEO Joint Employer Guidance, "Working Relationship Information," asks the EEO Office to answer the following questions and gather the following information:

[1] My thanks to James M. Szymalak, EEO Program and Policy Legal Advisor, Labor and Employment Law Division, Office of the Judge Advocate General, for his talk "Contingent Employee EEO Complaints" presented at the DA EEO Conference, 28 Apr 02 - 3 May 02. I had begun to write this paper months before, but his talk helped me both by providing a structure and by expanding the number and diversity of the cases I addressed.

1) Does a contract describing the working relationship between the complainant and the Army exist? If so, submit a copy.

2) Are you the Contracting Officer's Representative or Army official responsible for the project the complainant is working on? Please provide your name, title, and telephone number and the same information for any other key players.

3) How is the complainant paid and who determines his/her rate of pay?

4) What type of work does the complainant do for the Army?

5) Is there an end product you expect at the completion of complainant's contract? If so, what is it and when is it due?

6) Who assigns work to the complainant?

7) Does the complainant report to an office provided by the Army?

8) What equipment, materials and supplies does the complainant need to do his/her work for the Army and who provides them?

9) Does the complainant do work for anyone else besides the Army?

10) If a Government contractor employs the complainant, does that contractor provide an on-site supervisor?

11) Does the Army/DFAS withhold social security taxes or other taxes from the complainant's compensation?

12) Does the Army provide medical insurance for temporary or long-term disabilities?

13) Does the Army reimburse the complainant for any expenses? If so, please describe.

14) How were the complainant's working hours established?

15) Who determines whether the relationship between the complainant and the Army will continue and on what basis is that determination made?

16) Is a performance evaluation prepared on the complainant? If so, who prepares it and what input do Army officials have to it?

17) To whom does the complainant submit leave requests, and who approves those requests?

18) What are the details of any documents or conversations showing that the complainant was not being hired as an employee of the Army?

After the appropriate information is provided to the Labor Counselor, it is the Labor Counselor's duty to advise the EEO Office as to whether the complainant is a *de facto* "employee" or an "applicant." The EEO Joint Employer Guidance states, "Unless the Labor Counselor determines that the complainant is an 'employee' or 'applicant' within the meaning of 42 USC 2000e-16, the complaint should be dismissed on the grounds that it fails to state a claim, as well as any other applicable grounds."

Further guidance is found in EEOC Notice 915.002 (12/3/97) entitled, "Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms." This guidance sets forth the EEOC's criteria for determining whether a contingent worker is an "independent contractor" or qualifies as an "employee" within the meaning of the anti-discrimination statutes. The threshold question is whether a contract worker is an "employee" or an "independent contractor." The worker is a covered employee under the anti- discrimination statutes if the right to control the means and manner of his or her work performance rests with the staffing firm and/or the agency rather than with the worker himself or herself. The guidance states that even though a contractor employs a worker, the label used to describe the worker in the employment contract is not determinative. One must consider all aspects of the worker's relationship with the contractor and the agency. After having determined that the employee is not an independent contractor, the next step is to determine who is the worker's employer. Both the staffing firm and the agency, either separately or jointly, can be the employer. This guidance makes clear that the principle of joint and several liability applies to contingent employee cases.

Since *Wenli Ma and Zheng v. Dept. of Health and Human Services*, EEOC Appeal Nos. 01962390 and 01962389 (May 29, 1998), the EEOC case law has repeatedly stated that the test to determine whether or not the contingent worker is an "employee" is the common law definition of "employee" from *National Mutual Insurance Co.* v. *Darden*, 503 U.S. 318 (1992), adopted by the EEOC in *Wenli Ma and Zheng v. Dept. of Health and Human Services*, EEOC Appeal Nos. 01962390 and 01962389 (June 1, 1998). *Helene E. Park v. Army*, EEOC Appeal No. 01A10015 (September 27, 2001) synopsizes:

> In order to determine whether an individual is an "employee," . . . the Commission applies the common law of agency test, considering the full nature of the relationship between the complainant and the agency. *See Ma v. Department of Health and Human Services*, EEOC Appeal No. 01962390 (June 1, 1998) (citing *National Mutual Insurance*

Co. v. Darden, 503 U.S. 318, 323-324 (1992)). Specifically, the Commission will look to the following non-exhaustive list of factors:

(1) the extent of the employer's right to control the means and manner of the worker's performance;

(2) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision;

(3) the skill required in the particular occupation;

(4) whether the 'employer' or the individual furnishes the equipment used and the place of work;

(5) the length of time the individual has worked;

(6) the method of payment, whether by time or by the job;

(7) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation;

(8) whether annual leave is afforded;

(9) whether the work is an integral part of the business of the 'employer';

(10) whether the worker accumulates retirement benefits;

(11) whether the 'employer' pays social security taxes; and

(12) the intention of the parties.

In *Ma,* the Commission noted that the common-law test contains, 'no shorthand formula or magic phrase that can be applied to find the answer . . . All of the incidents of the relationship must be assessed and weighed with no one factor being decisive.' *Id.,* (citations omitted). The Commission in *Ma* also noted that prior applications of the test established in *Spirides v. Reinhardt,* 613 F.2d 826 (D.C. Cir. 1979), using many of the same elements considered under the common law test, were not appreciably different from the common law of agency test. *See id.*

Furthermore, under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (December 3, 1997) (Guidance), we also recognize that a 'joint employment' relationship may exist where both the agency and the 'staffing firm,' . . . may be deemed

> employers. Similar to the analysis set forth above, a determination of joint employment requires an assessment of the comparative amount and type of control the 'staffing firm' and the agency each maintained over complainant's work. *See Lopez v. Department of the Navy*, EEOC Appeal No. 01A03036 (February 23, 2001). Thus, a federal agency will qualify as a joint employer of an individual assigned to it if it has the requisite means and manner of control over that individual's work under the *Ma* criteria, whether or not the individual is on the federal payroll. *See* Guidance, *supra* at 11.

In *Helene E. Park v. Army*, EEOC Appeal No. 01A10015 (September 27, 2001), the Commission applied this test and found that the employee provided by a staffing firm to work as an administrative assistant to a manager in Korea was, in fact, a *de facto* employee of the Government. The agency argued that the contractor paid complainant's wages and benefits, deducting her taxes and her social security payments. The agency acknowledged that complainant worked at its facility and used its equipment, but argued that ManTech (the contractor) controlled the scope of her work. The agency argued that ManTech maintained the authority to terminate her. In a detailed analysis, the Commission found that complainant's work was clerical in nature and did not require specialized expertise. The complainant was closely supervised by the manager, who shared her office space and was the person who had selected her. The complainant even accompanied the manager on travel at agency expense. The Commission noted that the ManTech supervisor, who worked approximately an hour away, had little input into complainant's day-to-day assignments. The complainant's appraisals were based solely on the agency Contracting Officer's reports, who, in turn, got his information from the manager. Though the contractor determined the amount of complainant's leave, the agency first had to approve leave requests; they were then submitted to the contractor. Her reassignment was also a "joint" effort. As a result, the Commission found that complainant did not work independently and that she received supervision from no one other than the agency manager. The Commission found that "the agency exerted the degree of control necessary to qualify as a joint employer with ManTech, such that complainant may be deemed an 'employee' of the agency for the purpose of invoking Title VII protection."

Because these analyses are all fact-based, a review of the cases that the EEOC has decided since *Wenli Ma* is critical to the Labor Counselor who is making the recommendation regarding whether or not a contingent employee is a *de facto* employee. A review of EEOC decisions regarding complaints by contingent employees shows that a thorough investigation into the employment relationship between the contingent employee and the agency may result in the successful dismissal of the claim. The EEOC has repeatedly upheld the agency's decision to dismiss a complaint on the grounds of failure to state a claim, holding that the contingent employee was not an agency employee. It is not enough, however, to simply assert that the complainant is a contractor. *Darrell Clark* v. *U. S. Postal Service*, EEOC Appeal No. 01994112 (July 25, 2000). The agency must present facts in support of its claim. The following cases are illustrative of circumstances that may result in a dismissal:

Not *De Facto* Employee

LaShant Burroughs v. Department of Health and Human Services, EEOC Appeal No. 01A12130 (May 21, 2002). The Commission found that the record supported the agency's determination that complainant was not an employee of the agency at the time of the alleged discrimination. The complainant did not dispute that The Kevric Company paid her salary. The complainant failed to refute the agency's position that it was The Kevric Company that provided her with annual leave and other benefits. The complainant did not establish that the agency terminated her employment or that the agency's influence on her termination consisted of anything more than informing The Kevric Company that her situation had not worked out with the agency. Based on the record, the Commission found that complainant's relationship with the agency was that of an independent contractor and not an employee.

Ramon Barrera v. Department of Health and Human Services, EEOC Appeal No. 01A12566 (May 9, 2002). The Commission found that complainant was not an employee of the agency. The record showed that the complainant was a Residential Assistant through Kirk Enterprises (KE). The agency furnished basic materials required for residential services; provided limited computer equipment; and provided Government vehicles and paper/copying for work-related activities; however, the record indicated that KE was the primary supervisor of complainant. The record also reflected that complainant was paid, supervised and disciplined by KE; that KE gave complainant assignments and performance evaluations; that insurance benefits were provided by KE; and that complainant was not considered an employee of the agency for tax purposes. The employment agreement between complainant and KE indicated that KE made no representation regarding the duration of the assignment; that KE could cancel at any time; and that complainant's employment would end upon termination of his services at the agency facility. Under such circumstances, the Commission determined that complainant was not an agency employee under the purview of its regulations.

John P. Long v. Tennessee Valley Authority, EEOC Appeal No. 01A13290 **(**March 8, 2002). The Commission found that the record supported the agency's determination that complainant was not an employee of the agency at the time of the alleged incident. Upon review of the contract, the Commission determined that it was the intention of the parties that personnel provided by General Electric would not be considered agency employees. The contract stated that all persons engaged in carrying out any of General Electric's obligations under the contract shall be the servants of General Electric or its subcontractors and not the servants or agents of the agency. The complainant had failed to refute the agency's position that the agency did not provide him with annual leave, retirement benefits, or pay his social security taxes. The complainant also failed to establish that his salary was directly paid by the agency. The complainant stated in an e-mail to the EEO Counselor dated January 20, 2001, that an agency manager notified his employer, General Electric, that he would not be allowed to work on an agency site. Based on the record, the Commission found that complainant's relationship with the agency was that of an independent contractor and not an employee.

Pauline M. Yamane v. Department of the Army, EEOC Appeal No**.** 01A20421 (February 6, 2002). The record indicated that at the time of the alleged incidents, complainant was not employed by an agency, but was a participant in the Work Hawaii Program with the City and County of Honolulu. The record indicated that the Work Hawaii Program was responsible for the payment of complainant's salary, payroll taxes, and appropriate fringe benefits. Specifically, the record indicated that complainant signed and acknowledged the terms of her temporary employment with the City and County of Honolulu. The record also indicated that the agency did not provide complainant with annual, sick, holiday or other leave with pay provisions. The agency did not reimburse complainant for any expenses or provide her with medical insurance, retirement benefits or temporary or long term disability benefits. The agency stated that its obligation was to provide necessary supervision, training, work equipment and/or materials to enable complainant to perform her duties and to provide her sufficient work to occupy a full day. The agency also stated that it was responsible for maintaining and submitting to the Work Hawaii Program accurate sign-in/out sheets for verification of complainant's working hours. Based on the foregoing, the Commission found that complainant was not an agency employee.

Darrel Clark v. U. S. Postal Service, EEOC Appeal No. 01A11615 (January 4, 2002). In *Darrel Clark v. U. S. Postal Service*, EEOC Appeal No. 01994112 (July 25, 2000), the Commission vacated the agency's decision and remanded the case to the agency to conduct a supplemental investigation. After conducting this supplemental investigation, the agency again dismissed the complaint for failure to state a claim. The complainant signed a "Contract Employee Agreement" with TECH/AID Corporation, a private contractor, to fulfill an order with the agency. The Commission found that complainant was at the agency for two days prior to the alleged discriminatory action and that, therefore, there was little evidence available to document the nature of the work done by complainant at the agency other than the contract. The contract stated that the complainant was hired to complete an assignment at the agency, set the length of the assignment, and fixed the rate of pay. The complainant was paid directly by TECH/AID. The record reflected that there was a high degree of skill necessary to complete the assignment and that TECH/AID determined that complainant possessed the relevant skill to complete the assignment. A contract clause provided that he was not to accept employment directly or indirectly with the agency for a specified period upon completion of the assignment. Thus, complainant knew that he was not considered an employee of the agency. The Commission noted that although complainant claimed that he was supervised by the agency and told on a daily basis what assignments to complete, complainant was only oriented two days and participated in a practice drill and a test. In addition, the Commission notes that the computer work performed by complainant was not the main business of the agency. Thus, the Commission determined that complainant was not an agency employee under the purview of its regulations and that the complaint was properly dismissed for failure to state a claim.

Jacquelyn D. Collins v. Department of the Army, EEOC Appeal No. 01A13679 (November 20, 2001). The complainant provided relocation services for the agency's Directorate of Community Activities. In upholding the agency's dismissal of the complaint, the Commission

relied upon complainant's response to the agency's request for additional information. The complainant stated "I served as an independent contractor on two contracts for Fort Myer Army Community Services office; No SS taxes were withheld; No medical insurance was withheld; I received no reimbursable expenses; I was allowed to establish my own hours; and I never received a performance evaluation, only feedback regarding my performance from [an agency official] or through the rumor mill." In addition, complainant, in discussing the termination of the contract with an EEO representative stated, "Because of my contractor status, I'm not allowed to use the Pentagon's Housing Office computers."

Laurie Gruel v. Department of the Interior, EEOC Appeal No. 01A04606 (September 26, 2001). The complainant was employed as the Executive Director of the San Juan Mountains Association (SJMA) from May 1989 to December 1998. The SJMA was a non-profit organization that was created in 1988 to assist the San Juan National Forest in providing education and interpretation of public lands in Southwest Colorado. It had an agreement with the San Juan Forest and the Department of the Interior's Bureau of Land Management to develop educational programs, publications, and volunteer projects. The Commission found that complainant received her pay from the SJMA and was never appointed to the civil service. In addition, the record revealed that complainant did not have direct supervision by an agency supervisor, but rather was supervised by the board of directors of the SJMA. Further, according to the SJMA, the agreement between the SJMA and the agency provided that SJMA personnel were not to be considered federal employees. The record reflected that the agency had essentially no control over any aspect of complainant's work, providing only space and equipment.

Imelda Tovar v. Department of the Army, EEOC Appeal No. 01A12597 (June 29, 2001). The complainant alleged sexual harassment by the agency. The agency dismissed the complaint because it found that the complainant was employed by an independent contractor, LSI. The agency's Supervisory Production Controller stated the agency established complainant's working hours and the duration of the job and was able to assign additional work. The agency also provided complainant with work space, equipment and tools. However, the Commission found that the independent contractor was the primary supervisor of complainant. It found LSI gave complainant assignments; performance evaluations; and provided an on-site supervisor. LSI directed the hiring, removal and discipline of complainant. The complainant was considered an employee of LSI for tax purposes, salary and rate of pay. The contractor also provided complainant with insurance benefits, leave and workers compensation. Thus, the Commission affirmed the agency's final decision dismissing the complaint.

Lisa M. Butler v. U. S. Postal Service, EEOC Appeal No. 01996361 (May 4, 2001). The Commission upheld the dismissal of a complaint filed by a complainant worker employed by a contractor with the agency, USPS, for failure to state a claim. The contractor was responsible for providing all repairs to and maintenance of equipment used in performance of the contract. Moreover, the contract provided that the contractor provide to the agency a copy of complainant's driving record. The contractor was responsible for the return of agency property when an employee left its employment or at the end of the contract.

D. J. Gallegos v. Department of the Air Force, EEOC Appeal No. 01996720 (April 26, 2001). The Commission upheld the dismissal of a complaint by a contract Family Advocacy Treatment Manager for failure to state a claim. The complainant argued that she was an employee of the agency. She said that malpractice suits against contract employees were processed in the same manner as suits against general schedule employees and military personnel; only military personnel could sign her time sheet; only military personnel could approve her leave requests; and her security clearance was processed and approved by the agency. The Commission found that the complainant was a contract employee, and that under her employment contract, her job would end if the contract with the agency ended. The complainant's leave, health, and insurance benefits were set by her employment contract and her salary, increases and performance appraisals were determined by the contractor.

Tisa L. Manis v. Department of the Army, EEOC Appeal No. 01994513 (March 30, 2001). The Commission upheld the dismissal of the complaint for failure to state a claim. A private Government contractor hired, paid, and provided benefits to the complainant. The contractor maintained on-site management and assigned complainant her duties and work hours. The contractor was solely responsible for her training and performance evaluation.

Hazel Hunt v. *Department of Interior*, EEOC Appeal No. 01A11193 (March 27, 2001). The Commission upheld the dismissal of the complaint for failure to state a claim. The complainant was a janitor at the agency facility at the Hoover Dam. The record contained evidence that the complainant was paid, supervised, and disciplined by contractor employees. The contractor provided the necessary tools, materials, and equipment. The contractor paid insurance benefits. The complainant was not considered an employee of the agency for tax purposes.

Barbara D. Mosley v. Department of the Navy, EEOC Appeal No. 01996317 (March 21, 2001). The Commission upheld the dismissal of the complaint for failure to state a claim. A private contractor selected the complainant and told the agency that, although her Government supervisor could tell the complainant "what to do and how to do it," complainant was accountable to the private company's supervisors. In a memorandum, the agency asked the contractor to monitor and supervise the complainant's performance to ensure she performed at an acceptable level. The agency indicated that if her performance did not improve, "she should be removed from her duties". When the contractor terminated her, it stated that it had "lost confidence in [her] ability to perform as [its] employee." The record also reflected that the duties were set by the contract and that the contractor was responsible for providing her leave, handling her travel and training, paying her wages and maintaining her personnel file.

Patricia Smith v. Department of Veterans Affairs, EEOC Appeal No. 01994173 (March 15, 2001). The agency initially accepted this complaint because the complainant worked under "close supervision" by the agency and was terminated based upon its advice. Later, after its investigation, the agency dismissed the complaint for failure to state a claim. The agency found that the contractor paid complainant, withheld taxes, provided benefits, controlled training,

assigned complainant's duties, supplied her uniforms, and supervised her performance. The Commission upheld the dismissal finding that the contractor trained, supervised, and evaluated complainant's performance. Though the agency had the right to request that the complainant not work on agency grounds, the decision to terminate the complainant was the contractor's.

Richard E. Sundberg v. U. S. Postal Service, EEOC Appeal No. 01A10964 (March 9, 2001). In *Sundberg v. USPS*, EEOC Appeal No. 01993955 (August 2, 2000), the Commission vacated the agency's decision and remanded the complaint to the agency for a supplemental investigation. Specifically, the agency was ordered to conduct a supplemental investigation to determine whether complainant was an applicant for employment using the common law of agency test. The complainant was a Highway Contract Driver. On appeal after a second dismissal, the Commission found that the record reflected that by contract, complainant's work was specified, negotiated for a set period of time, to be performed at a specified location and at a predetermined formulized payment of wages. The agency did not provide complainant with annual leave, retirement benefits, or social security taxes. The complainant was responsible for providing his equipment and paying for his expenses. Moreover, complainant had appeal rights within the contract itself for disputing termination or non-renewals. Dismissal for failure to state a claim was upheld.

Robert McKernan v. Defense Commissary Agency, EEOC Appeal No. 01995741, (March 8, 2001). The complainant filed a complaint against the commissary because it failed to hire him as a bagger. The Commission looked at the terms of the agreement between the baggers and the commissary. Baggers expressly acknowledged that they were not employees of the commissary and were not under the supervision, direction or control of any employee of the commissary. Furthermore, baggers were only paid tips provided by patrons. The commissary did not deduct taxes from the baggers' earnings or provide baggers with any type of employee benefits, such as an employer pension, health or other fringe benefit plan of the commissary. The head bagger, not the commissary, established the work schedules for the baggers. Moreover, either party could terminate the agreement effective immediately upon the giving of reasonable notice of termination for cause. The fact that the agency may have held some minimal control over the manner and means of the baggers' work performance did not render the baggers employees of the agency when balanced against the findings listed above. Under the terms of the agreement between the baggers and the commissary, baggers expressly acknowledged that they were not employees of the commissary, but rather independent contractors. Thus, the Commission found that although the commissary may have had some minimal control over the baggers' work performance, it did not render them employees of the agency.

Susan R. Prather-Soppeck v. Department of the Air Force, EEOC Appeal No. 01990137 (December 22, 2000). The complainant was providing professional medical services in the agency's "Homes Program" when she allegedly suffered harassment. The agency dismissed the claim because she was an independent contractor. The Commission upheld the dismissal. It noted that the complainant was a highly skilled, independently licensed, medical professional who worked autonomously off-site in the homes of her patients providing patient care. Any

control exercised by the agency was limited to assessments of contract compliance. The Commission noted she was not on the agency payroll, did not receive agency employee benefits, and supervision was limited to peer review of her work.

Deborah A. Settles v. Tennessee Valley Authority, EEOC Appeal No. 01995149 (October 13, 2000). The Commission upheld the dismissal of a complaint by a Firewatch Laborer for failure to state a claim. The complainant was a contract employee with Stone and Webster Construction Company (SWCC). The Commission found that the complainant was not employed by the agency, but by SWCC. SWCC made employment decisions, including work assignments and termination of employment. It was also responsible for the payment of complainant's salary, payroll taxes, and employment benefits. The agency did not provide the complainant with annual leave, retirement benefits, or social security taxes. Furthermore, the record indicates that the duties of a Firewatch Laborer required a set route to be walked every shift to watch and check for signs of fire. An agency employee only provided general direction, including the route to be walked and the times thereof.

Albert Beard v. U. S. Postal Service, EEOC Appeal No. 01A03926 (August 22, 2000). The complainant claimed racial discrimination, but the agency determined he was an independent contractor and thus dismissed his claim on the grounds of failure to state a claim. The Commission found that complainant submitted a bid in response to the agency's solicitation for a mail transportation supplier. The agreement required complainant to provide a vehicle that met agency specifications. The complainant was paid a gross amount every twenty-eight days based on the fixed price established by the contract. The agency did not withhold taxes, pay social security and retirement benefits, or provide for annual leave and sick leave. Moreover, the record contained correspondence from complainant reflecting that the parties had an independent contractor relationship wherein the complainant identified himself as "owner/president" of B Enterprises Trucking.

Kenneth L. Ryfkogel v. Department of the Navy, EEOC Appeal No. 01A03701 (August 16, 2000). The Commission upheld the dismissal of a complaint by a contract optometrist for failure to state a claim. The Commission held that the agency did not sufficiently control the "means and manner" of the complainant's work. It noted that the complainant was a highly skilled, independently licensed, medical professional, who was expected to work autonomously in providing patient care. The length and nature of the relationship with the agency was determined by the contract between the complainant and the staffing firm. It noted that the staffing firm had the sole authority to terminate the complainant, which it did without affording him the rights normally given to federal employees. The Commission added that the complainant was not on the agency's payroll, did not receive any employee benefits, and could engage in the private practice of optometry, which the agency employees could not.

Kenneth L. Ryfkogel v. Department of the Army, EEOC Appeal No. 01A04012 (August 16, 2000). The complainant claimed sexual harassment during his employment as an optometrist at an agency medical center. The agency rejected the claim because complainant was an independent

contractor. The complainant appealed, claiming that he was a "joint employee" of the staffing firm and the agency. The Commission determined that as a highly skilled, independently licensed, medical professional, complainant worked autonomously in providing patient care. Any control by the agency related merely to office routines, such as scheduling and patient referrals. While the agency could request reassignments; schedule changes; or even removal to better accommodate its needs, it did not have the authority to do so directly. The agency had no authority to prohibit complainant from engaging in the private practice of optometry, a control it exercised over the doctors that it did employ. The Commission found that complainant was not on the agency's payroll, or receiving any agency employee benefits and that, therefore, he was not an "employee" of the agency.

Linda M. Lewis v. Federal Emergency Management Agency, Agency Appeal No. 01995707 (July 13, 2000). The Commission found that the complainant was an employee of the U.S. Department of Agriculture (USDA), and not FEMA. As an employee, complainant received pay, annual leave, and benefits from the USDA. USDA supervised her and provided her with evaluations. Although complainant argued that FEMA controlled her working conditions, the Commission viewed complainant's brief and occasional contact with FEMA as too infrequent to warrant finding an employer-employee relationship between the agency and complainant. Thus, the Commission found that the agency properly dismissed the complaint for failure to state a claim.

William Ackley v. Environmental Protection Agency, EEOC Appeal No. 01A01626 (May 19, 2000). The Commission upheld the dismissal of a complaint for failure to state a claim filed by a contract employee with the National Council of Senior Citizens (NCSC), a contractor with the EPA. The complainant filed when his contract was not renewed. The Commission found that the complainant was not an employee of the EPA. He received his pay from the NCSC, received both annual and sick leave from the NCSC, his unemployment insurance was to be paid by the NCSC, and he was to receive the same holidays as the assigned agency. The complainant did not have direct supervision by an agency supervisor but rather an agency official signed off on the complainant's administrative paperwork. The contract specified that contractors were not agency employees.

Bernard G. Lopez v. Department of the Navy, EEOC Appeal No. 01A03036 (February 23, 2000). The complainant, a former agency employee, was contracted to work in the agency's shipyard. The complainant had a documented disability and requested a designated disability parking space on the shipyard premises. The agency refused on the grounds that the complainant was not an agency employee and thus, the agency was not obligated to provide a reasonable accommodation. The agency also noted that the union agreement prohibited the agency from assigning parking spaces to non-employees. The complainant brought a complaint for failure to provide a reasonable accommodation, but the agency dismissed for failure to state a claim. In *Bernard G. Lopez v. Department of the Navy*, EEOC Appeal No. 01986332 (August 24, 1999), the Commission vacated the agency's decision, finding insufficient evidence to determine whether or not the complainant was an employee. The agency conducted a

supplemental investigation and again dismissed the complainant's claims. The Commission found that the agency had essentially no control over any aspect of complainant's work, providing only space and equipment. The complainant acknowledged that he had been employed by Applied Technology Associates. Thus, the Commission found that the complainant was not solely or jointly an employee of the agency, and upheld the dismissal.

***De Facto* Employee**

Sharon L. Koob v. U. S. Postal Service, EEOC Appeal No. 01A10705 (October 11, 2001). The Commission vacated the agency dismissal of this complaint and remanded it for further investigation in *Koob v. U.S. Postal Service*, EEOC Appeal No. 01A01713 (June 9, 2000). The record shows that complainant provided services to the agency as an Occupational Health Nurse Administrator (OHNA) under a standardized contract used by the agency in its procurement of health services. The contract set forth very specific duties, to be performed at the agency, on certain days during certain hours, and required the OHNA to supervise all activities by the health unit. The contract further specified that the OHNA was "functionally" supervised by the Senior Area Medical Director, and "administratively" supervised by the same director, as well as the Manager of Human Resources. The Commission followed its decision in *Woods v. U. S. Postal Service*, EEOC Appeal No. 01971155 (June 12, 1998), decided under similar facts. The Commission determined that the "position description" in the agency's standardized contract resulted in the agency exercising "primary control" over the work performed under the contract, such that the complainant could not be deemed an independent contractor.

Gerald W. Hammock and Doris C. Chaney v. Tennessee Valley Authority, EEOC Appeal No. 01A02271 and 01A02273 (July 17, 2000). This was a case brought under the ADEA. The complainants were journeyman machinists working at the Power Shop Service, operating machinery necessary to rebuild and repair generators. The contract provided that the contractor would remove from the job site any contractor personnel determined to be unfit for performance of his or her duties or acting or working in violation of job site work rules. Additionally, the contract specified that the contractor agreed to work as an independent contractor. Despite this, the Commission found that complainants were "employees." The Commission found that the agency held complete control over the manner and means of complainants' work performance. The complainants were supervised by agency employees, subjected to agency employment rules, and evaluated by agency management. Further, they worked alongside regular agency employees performing the same or similar tasks, had access to agency facilities comparable to those given to regular employees, and used agency tools and equipment in the performance of their jobs. The agency also released complainants from their employment with the agency, although it is unclear whether the agency chose which individual machinists to lay-off. Additionally, the agreement provided for the agency to pay the contractor the salary and payroll taxes of its workers, and for the contractor to record, process, and distribute the paychecks. The work complainants were completing involved repairing and constructing power generation equipment and the Commission considered the generation of power to be an integral agency duty. As a result, the Commission found these complainants to be "employees."

Steven M. Lonergan v. Department of Veterans Affairs, EEOC Appeal No. 05970406 July 10, 2000. In 1991, complainant was placed by his vocational rehabilitation specialist in a "Chapter 31 Training Program" (unpaid work experience) at the agency's Bay Pines, Florida, Medical Center. Between December 1991 and November 1992, complainant worked as a Claims Clerk in that facility's Medical Administration Service. From October 1993 to February 1994, complainant worked as a Clerk in the facility's Police & Security Service. Though the Commission had found that the complainant was not an employee in *Steven M. Lonergan v. Department of Veterans Affairs*, EEOC Appeal No. 01963586 (January 15, 1997), and the Commission rejected the complainant's request for reconsideration as insufficient, it exercised its discretion to reconsider the prior decision on its own motion. The Commission distinguished this case from *Meador v. Department of Veterans Affairs*, EEOC Request No. 05920836 (April 1, 1993), in which an unpaid trainee was held not to be an employee. The Commission noted that the complainant has been identified as having worked in two specific positions, and that, like a regular employee, he worked designated hours in those positions. Therefore, though complainant was technically a trainee, there were aspects of his relationship with the agency indicative of an employer/employee relationship. Finding application of the Darden test appropriate, the Commission considered that, for upwards of 14 months, complainant worked designated hours and that the work he performed fell within the parameters of the agency's regular business. The agency, as evidenced in part by the three performance evaluations the complainant was issued, both assigned him work and controlled the manner in which that work was accomplished. Although the complainant was not paid an actual salary, he did receive a monthly stipend through an agency rehabilitation program that was directly related to his participation in the program. For these reasons, the Commission found that the agency's control over the complainant and his work product was such that, under the common law of agency, he should be considered an employee.

Charlene E. Scott v. Department of Energy, EEOC Appeal No. 01984578 (November 23, 1999). The complainant alleged that she was an employee. She said she had no written contract; however, she supplied her resume, was hired for an indefinite period, and believed she could become permanent. She worked exclusively for the agency and was not permitted any outside work. She had assigned projects, but was also to help out where needed. The agency supervised and trained her and controlled her day-to-day work. She exercised little independent judgment. She had the same building access as other employees and was integrated into the business of the agency. The agency hired, supervised, and terminated her assistants. She was paid by the hour through time cards submitted through the agency. She did not have a separate business plan or insurance. The agency did not respond to the appeal, although the Commission noted that there was information in the file. The letter from the agency's Office of General Counsel stated that the complainant had a six-month renewable agreement and that the agency did not provide annual leave, sick leave, retirement benefits, hospitalization/health benefits, or withhold taxes. The contract was not included, nor was there information addressing any of the other *Ma* factors. Due to the agency's failure to support its assertion that the complainant was an independent contractor, the Commission found the complainant to be an employee of the agency. [*Charlene*

E. Scott v. Department of Energy, EEOC Appeal No. 05A00268 (December 12, 2001) is also instructive because it reiterates that if you have evidence at the time of the hearing, you must produce it at the hearing. Having lost at hearing, the agency, in its request for reconsideration, produced evidence by which it sought to prove that Ms. Scott was an independent contractor. The Commission said that it should have been produced at the hearing and rejected the new evidence.]

Remanded

Kymbal D. Lindsay v. General Services Administration, EEOC Appeal No. 01990084 (November 16, 2001). The Commission vacated the dismissal of a complaint for failure to state a claim and remanded it for further investigation. A Telecommunications Specialist who worked for Spencer Reed Company at the Agency's Federal Communications Services in Denver, Colorado, filed the complaint. The Commission found that there was insufficient evidence in the record addressing whether the complainant was an "employee" of the agency under the common law of agency. Specifically, there was no evidence showing whether complainant was paid, supervised, or disciplined by contractor employees. In addition, there was no evidence showing the contractor provided complainant's vacation and insurance benefits and whether the complainant was considered an employee of the agency for tax purposes.

Patricia L. Lawless v. General Services Administration, EEOC Appeal No. 01A13826 (September 6, 2001). This case found that the agency had not provided sufficient evidence to address whether complainant was an "employee" of the agency. The complainant was a cafeteria manager through Southern Food Service working in a Government facility. The Commission noted that the record contained evidence reflecting that complainant was paid, supervised and disciplined by contractor employees. The record further reflected that the contractor provided vacation benefits and insurance benefits and that complainant was not considered an employee of the agency for tax purposes. The Commission found that the record did not support the agency's dismissal of complainant's complaint. The case was remanded.

Barbara M. Walker v. U. S. Postal Service, EEOC Appeal No. 01996514 (May 31, 2001). The Commission found that complainant identified herself as a private contractor, but that there was little evidence in the record indicating that complainant was hired and paid by a private employer, and was under contract with the agency. The agency appeared to rely on statements made by the Transportation Manager in which he asserted that complainant did not report to him and that he was not her supervisor, to attempt to establish that it did not control the means and manner of complainant's employment. The agency was faulted for relying heavily on the Spirides, *Id*. factor which states that "the extent of the employer's right to control the means and manner of the worker's performance is the most important factor". The agency failed to address any of the other factors mentioned in *Ma*.

John Pettyjohn v. Department of Veterans Affairs, EEOC Appeal No. 01A04097 (April 3, 2001). The Commission vacated the dismissal of a complaint filed by a complainant who said he was a volunteer for failure to state a claim. The Commission remanded the case for further investigation. The Commission found that there was insufficient evidence in the record to determine whether the Commission had jurisdiction over the complaint. In both his formal complaint and on appeal, complainant stated that he volunteered and maintained an office at the agency. The Commission found that it was unclear when complainant occupied the various service officer positions and whether these volunteer positions qualified him for protection under the EEO regulations. The Commission found that the record did not clearly identify complainant's status with the agency at the time of his complaint.

H. Douglas Hamilton II v. Department of the Navy, EEOC Appeal No. 01996039 (December 19, 2000). The complainant alleged that he was subject to discrimination based on race. The agency dismissed the complaint for failure to state a claim. The agency maintained that complainant was an employee of an independent company under contract with the agency. However, in the narrative attached to complainant's formal complaint, he asserted that he was discriminated against when applying for employment with the agency. The Commission found that the complainant was working as an independent contractor at the time he suffered the alleged discrimination. However, his claim of discrimination was based on his status as an applicant for a permanent position with the Government. Based on this rationale, the Commission found the agency's dismissal improper.

Marvin J. Matthaei v. U. S. Postal Service, EEOC Appeal No. 01996122 (October 27, 2000). The Commission found that the Contract Personnel Questionnaire that was part of the record did not provide all of the information that was necessary to render a determination as to complainant's status. Therefore, the Commission was unable to ascertain whether complainant was an employee of the agency at the time of the alleged discrimination.

Processing Pointers [2]

The EEO Office should initially determine whether the employee wishes to file against the Army, the contractor, or both. If the complainant wishes to file against the Army, the EEO Office should assign a counselor and collect the information needed to perform the "Working Relationship Information" analysis. If the employee wishes to file a formal complaint, the labor counselor must render a fact-based analysis and legal opinion as to whether the worker is a *de facto* employee. If it is determined that the complainant is not a *de facto* employee, the complaint may be dismissed and the employee given their appeal rights to the Office of Federal Operations. If the analysis indicates that the complainant is a *de facto* employee, then the complaint should be processed. The labor counselor should work with the contracts attorney responsible for the contract regarding liability and possible litigation against the contractor. If the complaint is accepted and it is later determined that the complainant was not a *de facto* employee, the agency may claim that the action should be dismissed due to lack of jurisdiction over the complaint. Jurisdictional issues may be raised at any stage of the proceedings.

A few final comments: 1) always issue a "Notice of Right to File a Formal Complaint of Discrimination;" 2) don't forget to apply your other 1614.107 dismissal bases when they apply; 3) avoid improper contact with the contractor; go through the Contracting Officer's Representative; and 4) if the complainant files directly against the contractor, the EEO Office becomes the point of contact, but no information is released without labor counselor concurrence.

The Point of Contact for this subject in the CECOM Legal Office is Kathryn DuCharme Poling (703) 704-0235; DSN 654-0235.

KATHRYN T. H. SZYMANSKI
Chief Counsel

[2] These processing pointers are derived from the talk "Contingent Employee EEO Complaints" presented at the DA EEO Conference, 28 Apr 02 - 3 May 02, by James M. Szymalak, EEO Program and Policy Legal Advisor, Labor and Employment Law Division, Office of the Judge Advocate General.